FILED
July 1, 1999
Clerk, U.S. District Court
Eastern District of California
/s/ Deputy

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

RICHARD N. BROWN,

Petitioner, No. CIV S-99-0241 WBS GGH P

vs. FINDINGS AND RECOMMENDATIONS

D.A. MAYLE, Warden,

Respondent.

_____/

I. Introduction

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his 1996 conviction for petty theft with a prior for which he was sentenced to 25 years to life pursuant to California's Three Strikes Law.[1/] Petitioner was caught stealing

---

1. Cal. Penal Code § 667(e) provides:
(e) For purposes of subdivisons (b) to (i), inclusive and in addition to any other enhancement or punishment provisions which may apply, the following shall apply where a defendant has a prior felony conviction:
(1) If a defendant has one prior felony conviction that has been pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction.
(2)(A) If a defendant has two or more prior felony convictions as defined

a car alarm from a Walgreen's store.

Petitioner raises four grounds for relief: 1) the Three Strikes law is unevenly applied; 2) petitioner should be resentenced pursuant to People v. Superior Court (Romero), 13 Cal. 4th 497, 53 Cal. Rptr. 2d 789 (1996); 3) his sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment; 4) his prior convictions should not be counted as strikes because they occurred before the Three Strikes Law was enacted.

After carefully reviewing the record, the court recommends that the petition be denied.

II. AEDPA

The AEDPA applies to this petition for habeas corpus which was filed after the AEDPA became effective. Neelley v. Nagle, 138 F.3d 917 (11th Cir. 1998), citing Lindh v. Murphy, 117 S. Ct. 2059 (1997). The AEDPA "worked substantial changes to the law of habeas corpus," establishing more deferential standards of review to be used by a federal habeas court in assessing a state court's adjudication of a criminal

---

in subdivision (d) that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of:

(i) Three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior felony convictions.

(ii) Imprisonment in the state prison for 25 years.

(iii) The term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, or any period prescribed by Section 190 or 3046.

(B) The indeterminate term prescribed in subparagraph (A) shall be served consecutive to any other term of imprisonment for which a consecutive term may be imposed by law. Any other term imposed subsequent to any indeterminate term described in subparagraph (A) shall not be merged therein but shall commence at the time the person would otherwise have been released from prison.

In addition, a "three striker" must serve at least 80 percent of his [minimum] sentence. § 667(c)(5). In petitioner's case the minimum term is twenty-five years, and he would first be eligible for parole in twenty years.

defendant's claims of constitutional error. Moore v. Calderon, 108 F.3d 261, 263 (9th Cir. 1997). Most important to this case are the changes to 28 U.S.C. § 2254(d) which now read:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

The difficulty is in determining, consistent with Congress' intent, the proper mode of analysis to be applied in evaluating a claim under § 2254(d). In Moore v. Calderon, the Ninth Circuit determined that pure questions of law would be judged by the "contrary to" standard (de novo), and mixed questions of fact and law would be subject to the "unreasonable application of" standard (deference). The Ninth Circuit revisited this issue in Davis v. Kramer, 167 F.3d 494 (9th Cir. 1999). In Davis, the Ninth Circuit essentially rejected the formula set out in Moore v. Calderon, supra, and observed that the terms "contrary to" and "unreasonable application of" "reflect the same general requirement that federal courts not disturb state court determinations unless the state court has failed to follow the law as explicated by the Supreme Court. Id. at 500. The court further explained,

> The terms, read together, delineate the range of cases that warrant federal habeas relief under § 2254(d)(1).

> The terms overlap, and cases may fall into one or both classifications, depending on the circumstances. No purpose would be served by attempting to establish a fixed division or to give meaning to one that would exclude the other. Their purpose is the same: to ensure the objective that state courts follow controlling Supreme Court law. [footnote omitted.] For our purposes here, we need state only that a state court decision amounts to an unreasonable application of clearly established federal law where the state court fails to apply a legal principle, enunciated in one or more Supreme Court decisions, to a situation where such application is required by the force and logic of the Court's decision.

Id. at 500.[2/]

In Davis, the Ninth Circuit did not describe the standard to be applied in determining whether a state court decision involved an unreasonable application of federal law. However, the Ninth Circuit indicated that if the state court had "failed to apply" the appropriate precedent, no AEDPA deference would be due. Furthermore, if the state court had "misinterpreted" the controlling precedent, no AEDPA deference could be shown by the federal courts, as would be the

---

2. In Davis, the Ninth Circuit also indicated that it was not adopting a "pure law vs. mixed question" approach:

> In a footnote in Moore v. Calderon, 108 F.3d 261, 265 n. 3 (9th Cir. 1997), we stated in dicta that the "contrary to" test applies to questions of law, while the "unreasonable application" test applies to mixed questions of law and fact. While this is certainly true in some instances, in the Moore footnote we did not attempt a complete definition of these statutory terms, or set forth an inflexible rule. Nor do we here. We leave the terms with the full flexibility and potential for interchange with which we found them.

Id. at 500 n. 7.

case if the application of precedent was simply "unreasonable." The Davis court itself conducted a de novo review.

However, even more recently, the Ninth Circuit implicitly rejected the "flexible" approach utilized in Davis, and citing Moore v. Calderon unequivocally held "[w]e previously have determined that the standard of 'unreasonable application of [ ] clearly established Federal law' in the new § 2254 governs mixed questions of law and fact, while the standard of 'contrary to . . . clearly established Federal law' applies to pure questions of law." Furman v. Wood, 169 F.3d 1230, 1232 (9th Cir. 1999). Quite apparently, Furman did not view the earlier Moore case's statement as dicta. The court will utilize the Moore/Furman analytical framework.

In applying that framework, the undersigned has applied the standard used by the First, Fifth, Seventh, and Eleventh Circuits, and most recently the Sixth and Fourth Circuits as well. See Drinkard v. Johnson, 97 F.3d 751 (5th Cir. 1996); Lindh v. Murphy, 96 F.3d 856 (7th Cir. 1996), revsd. on other grounds, 117 S. Ct. 2059 (1997); O'Brien v. Dubois, 145 F.3d 16, 25 (1st Cir. 1998), and Neely, supra.[3/] In defining this

---

3. Recently, the Sixth Circuit held that it was adopting the Drinkard standard. Nevers v. Killinger, 169 F.3d 352, 361 (6th Cir. 1999):

> Since we heard oral argument in this case this Court, in Herbert v. Billy, 160 F.3d 1131, 1998 WL 801319 (6th Cir. Nov. 20, 1998), has stated its agreement with the "reasonable jurist" approach taken by the Fifth Circuit in Drinkard, 97 F.3d at 769. Today we state as well our agreement with the standard enunciated by the First Circuit, namely, that "for the writ to issue, the state court decision must be so offensive to existing precedent, so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes." O'Brien, 145 F.3d at 25; accord Hall, 106 F.3d at 748-49 ("The statutory 'unreasonableness' standard allows the state court's conclusion to stand if it is one of several equally plausible outcomes."). We recognize that the First Circuit specifically rejected Drinkard's "reasonable jurist" test when articulating its own standard, O'Brien, 145 F.3d at 25 n. 7. We think, however, that the two are not mutually exclusive; rather,

standard, the Fifth Circuit held that "a application of law to facts in unreasonable only when it can be said that reasonable jurists considering the question would be of one view that the state court ruling was incorrect." Drinkard, 97 F.3d at 769. The standards applied by the First and Seventh Circuits are similar. See Lindh v. Murphy, 96 F.3d at 870; O'Brien v. DuBois, 145 F.3d at 25.[4/] Because the Ninth Circuit has not directly opined on the standard of review in an "unreasonable application" context, the undersigned maintains his previous analysis based on out-of-circuit authority.

In the instant case, the California Court of Appeal issued a written decision denying petitioner's appeal. Respondent's Exhibit A. The only federal claim specifically addressed by the appellate court was petitioner's Eighth Amendment claim. The California Supreme Court issued a "postcard denial" of the petition for review. Respondent's Exhibit B. The California Court of Appeal and California Supreme Court denied petitioner's habeas corpus petitions with postcard denials as well. Respondent's Exhibits D, E. Because only the Eighth Amendment claim is addressed in a reasoned decision, only the appellate court's decision addressing this claim will be given full AEDPA deference. The Ninth Circuit has had some difficulty in articulating the AEDPA deference

---

both standards can be employed to aid in arriving at the correct answer to the question of "unreasonableness." The deference to the state courts' judgments required by the AEDPA is achieved by adopting the rule that the unreasonableness of a state court's application of clearly established Supreme Court precedent will not be "debatable among reasonable jurists," Drinkard, 97 F.3d at 769, if it is "so offensive to existing precedent, so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes," O'Brien, 145 F.3d at 25.

The Fourth Circuit in Green, which the Ninth Circuit cites in Davis, adopted the Drinkard standard. See Green, 143 F.3d at 870, 873.

4. See footnote 6 above.

due in a situation where a claim(s) is not addressed in a written, reasoned decision. In an initial opinion, the Ninth Circuit held that no deference was due, and that the federal court should decide the issue de novo. Delgado v. Lewis, 168 F.3d 1148 (9th Cir. 1999). However, that opinion was vacated on rehearing, and the revised rule for claims not addressed in a written decision is that the federal court should "independently" assess the state court decision in light of the AEDPA standard-whether the correct Supreme Court law was applied, and whether the application was unreasonable in light of the clearly established federal law. Delgado v. Lewis, ___ F.3d ___, 1999 WL 415523 * 3 (9th Cir. June 23, 1999). While the court is unsure of what a "dependent" review may entail for claims addressed in a written opinion, other than what has been set forth in the text, the court shall conduct an "independent" review for the unaddressed claims utilizing essentially the same standard as set forth in the text.

III. Discussion

A. Uneven Application of Three Strikes Law

In ground one, petitioner contends that in People v. Bishop, 56 Cal. App. 4th 1245 (1997) the California Court of Appeal for the Second Appellate district upheld the trial court's decision to dismiss two of the defendant's strikes. As a result, the Bishop defendant was not sentenced to 25 years to life pursuant to the Three Strikes Law. The appellate court found that dismissal of the strikes was not an abuse of discretion where the present crime was petty theft and the prior violent offenses which were stricken were remote. The appellate court found that the trial court had discretion to strike the priors pursuant to People v. Superior Court (Romero), 13 Cal. 4th 497, 530-31, 53 Cal. Rptr. 2d 789 (1996), where the California Supreme Court held that trial judges had discretion to strike priors pursuant to Cal. Penal Code § 1385.

Petitioner contends that the facts of his case are "practically identical" to those in Bishop and, on that ground, this court should grant review to resolve the conflict between the second appellate district and the third appellate district, which denied his request to strike his priors.[5]

This court has no authority to resolve a conflict between state appellate courts. However, the court construes these allegations to state an Equal Protection claim. In order to demonstrate that a sentencing statute violates the Equal Protection Clause, a petitioner must state a claim that the statute is unevenly applicable to criminal defendants or is unevenly applied. See McQueary v. Blodgett, 924 F.2d 829, 834-35 (9th Cir. 1991). "Under the prevailing rational-basis test, plaintiffs in appellant's position bear the burden of establishing a prima facie case of uneven application." Id. at 835.

In the instant case, petitioner is contending that the Three Strikes law in unevenly applied. However, other than the case of Bishop, supra, petitioner provides no facts to support this contention. Petitioner cannot state a prima facie case of uneven application based on one other case. In any event, petitioner's case is distinguishable from Bishop.

In Bishop, the defendant had the following convictions:

---

5. Petitioner does *not* contend that his trial judge believed that he did not have the discretion to strike prior conviction allegations but that other defendants had trial judges who believed they had the authority to do so. If such an allegation had been made, the equal protection analysis may have been more difficult. However, the California Supreme Court case of People v. Superior Court (Romero), 13 Cal. 4th 497, 53 Cal. Rptr. 2d 789 (1996), which held that trial judges have a limited discretion to strike prior conviction allegations, was expressly retroactive and applied to petitioner's case. Petitioner filed a "Romero remand" habeas corpus petition in which the sentencing court reviewed its record to determine whether striking prior conviction allegation discretion would have been utilized. The trial court in this case found that the record was clear that such discretion would not have been exercised. Respondent's Exhibit C. See also RT 285-296. Thus, petitioner's argument is simply that discretion *should* have been favorably exercised here because it was favorably exercised in allegedly similar cases.

1969-robbery (strike 1).
1979-robbery with use of a firearm and assault (strikes 2 and 3).
1982-battery of a custodial officer.
1987-petty theft with a prior.
1988-petty theft with a prior.
1991-petty theft with a prior.
1993-petty theft with a prior and commercial burglary.

Bishop, 56 Cal. App. 3d at 1248 n. 1, 66 Cal. Rptr. 2d at 348 n. 1.

The defendant in Bishop had stolen six videocassettes from a Thrifty Drug Store. Id. at 1248, 66 Cal. Rptr. 2d at 348. He was 50 years old and his lifetime of crime was directed toward supporting his drug use. Id. In addition to the prior convictions alleged in the case, the Bishop defendant was convicted of other theft offenses and had sustained a federal drug conviction in the mid-1960's for which he had been incarcerated. Id. at 1245 n. 3, 66 Cal. Rptr. 2d 348 n. 3. The opinion of the Court of Appeal in Bishop did not describe these other theft offenses nor indicate how many there were.

In Bishop, the California Court of Appeal observed that in considering whether to strike a prior conviction courts must consider the nature and circumstances of the offense, the defendant's appreciation of and attitude toward the offense, or his traits of character as shown by his behavior and demeanor at trial. Bishop, 56 Cal.App.4th 1249, 66 Cal. Rptr.2d at 349.

> To be sure, once a defendant has qualified for three strikes sentencing, the number of his prior convictions operates as a factor in aggravation, as may the nature of his prior and present crimes and the timing with which they were committed. However, the nature and timing of a defendant's crimes may also operate as mitigation, such as in this case where the present offenses are remote. The length of sentence to be

> imposed also presents an open-ended inquiry because, when considered in conjunction with the defendant's age, it presents the trial court with an opportunity to evaluate factors such as how long the state maintains an interest in keeping the defendant as a public charge and after what period of incarceration he is no longer likely to offend again.

Id. at 1250-51, 66 Cal.Rptr.2d at 349-50.

In the instant case, the court has reviewed the probation report (CT 231-235) and the state records ("rap sheet") attached to petitioner's traverse. While petitioner disputes some of the information contained in the probation report, the court finds that petitioner has suffered the following prior convictions:

> 1971-two felony burglary convictions.[6/]
> 1976-two felony counts of assault with a deadly weapon (one case).
> 1984-felony robbery[7/] and misdemeanor being under the influence of a controlled substance.[8/]
> 1986-misdemeanor being under the influence of a controlled substance.
> 1987-misdemeanor giving false information to a peace officer, and misdemeanor driving on a suspended license and driving under the influence.
> 1989-misdemeanor theft.

---

6. The rap sheet shows four felony burglary convictions in 1971, although it appears that two of the convictions are listed in duplicative entries.

7. Petitioner was originally convicted of felony burglary and robbery in 1982, but in 1984 the case was remanded and petitioner pled guilty to one court of felony robbery.

8. Petitioner received diversion for this charge in 1984, but in 1986 diversion was terminated and petitioner was sentenced.

> 1990-misdemeanor theft (two convictions); felony vehicle theft; misdemeanor giving false report to a peace officer; misdemeanor burglary, misdemeanor distribution of hypodermic needles without a license.
> 1991-misdemeanor theft, misdemeanor battery, misdemeanor petty theft with a prior.
> 1992-misdemeanor robbery, misdemeanor possession of paraphernalia.
> 1994-misdemeanor possession of certain controlled substances without a valid license.

In addition, as a juvenile petitioner was placed in a camp program for a violation of assault with a deadly weapon. Opinion Court of Appeal, p. 2, Respondent's Exhibit A. The following year he was committed to the Youth Authority for assaulting a camp ward and running from the camp. Id.

In some respects, petitioner's record is similar to the defendant's record in Bishop. His strike priors are equally remote.[9/] He and the Bishop defendant are close in age.[10/] Like the Bishop defendant, petitioner's criminal record suggests a history of drug use.

However, petitioner's criminal history appears longer, more varied and involved more (and more recent) violence than the Bishop defendant. In sentencing petitioner to 25 years to life, the trial court in the instant action made the following comments:

> . . . as the Court has already previously noted, the defendant's criminal history is long and without interruption. There are 17 misdemeanor convictions

---

9. The Bishop defendant's strikes were 17 and 20 years old. Petitioner's strikes were based on his 1976 assault with a deadly weapon conviction and his 1984 robbery conviction. Therefore, his strikes were 11 and 19 years old. However, petitioner's 1984 conviction was based on a 1982 conviction that had been reversed. Therefore, his robbery conviction was arguably 13 years old.

10. Petitioner was 43 and the Bishop defendant was 50.

and five or six felony convictions, including this case. Six if you include the 10851 from 1990. There are two violent offenses as a juvenile beginning in 1967 where the defendant did a strong-arm robbery and grand theft auto. It sounds like a car-jacking before its time, committed to CYA. And then there was an assault on camper. That was the beginning of his criminal history.

In 1971, the defendant suffered his first felony, burglary in the second degree. Sent to prison. Concurrent with that was a second felony for second degree burglary. Again sent to prison. It's noted that the arrest charges in that case were 211 PC also.

Third and fourth felonies in 1976, which actually could be the two strikes as I viewed the complaint or the information in this case. It was only charged as one strike. 1976, two counts of 245 PC where the defendant shot at somebody.

In 1984, after remand from the appellate court, the defendant plead guilty to one count of 211. It's noted that that case started off as a multiple count 211, a home invasion-type of case.

The People are quite correct when they point out that there is violence in the recent past relating to the 1991 242 and the 1992 211 as a misdemeanor. There is virtually a continuous lifestyle beginning in 1967 and ending in 1995 where the defendant has been in trouble with the law.

This is not the kind of situation where the defendant's last felony conviction, last conviction of any sort, I should say, was in 1984 and he's lived a totally

> blameless life for that period of time. This is far from that kind of situation. In short, the defendant in no way equates to the defendant in the Dillon case.
>
> . . . there are also other factors which the Court should consider when exercising its discretion under PC 17. First, it is defendant's potential for rehabilitation, and, second, the community's need for protection. As I noted earlier, the circumstances of this offense, while they might seem trivial in terms of the amount, it's clearly a situation from the Court's mind that the defendant was stealing for resale and not for subsistence.
>
> As to the defendant's potential for rehabilitation, certainly his prior track record is indicative of his lack of potential for rehabilitation. Further, the defendant's statement in the POR, the probation officer's report, which the Court previously read regarding the circumstances of the offense, indicate that the defendant lacks remorse and is still blaming others for his problem.
>
> Finally, on the issue of community protection, it's clear that from the defendant's criminal history, the community would be protected from the defendant best by sentencing him to 25 to life. Again, with respect to the PC 17 analysis, the Court wants to make it clear that we're talking about a sentence of 25 to life, not 50 to life.

RT at 294-96.

Petitioner's lengthy and more violent past distinguishes him from the Bishop defendant. Therefore, while petitioner cannot rely on only one other case to establish uneven

application of the Three Strikes law, the Bishop case would not support his Equal Protection claim anyway. Because petitioner has not established a prima facie case for an Equal Protection violation, this claim should be denied.

B. Re-sentencing Pursuant to Romero

In claim two, petitioner requests that he be remanded to superior court for Re-sentencing pursuant to People v. Romero, supra. As stated above, in Romero the California Supreme Court found that trial courts have discretion to strike priors in Three Strikes cases.

This court has no authority to remand petitioner to state court for re-sentencing pursuant to Romero. Petitioner should request, and has requested, the state court for this relief. See footnote 6, supra.

C. Eighth Amendment

Petitioner alleges that his sentence is cruel and unusual in violation of the Eighth Amendment. In United States v. Bland, 961 F.2d 123 (9th Cir. 1992) the Ninth Circuit summarized the standard for considering Eighth Amendment challenges to sentences:

> The Supreme Court most recently addressed the question of proportionality as a component of the eighth amendment in Harmelin v. Michigan, 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991). No majority opinion emerged in Harmelin on the question of proportionality. Justice Scalia's two Justice (with Chief Justice Rehnquist) plurality concluded that there was no proportionality review under the eighth amendment except with respect to death sentences. Justice Kennedy's three-Justice concurrence (with Justices O'Connor and Souter)

> concluded that the eighth amendment contains a narrow proportionality principle, which was not confined to death penalty cases. Because neither position received a majority vote, the holding in Harmelin should be viewed as "that position taken by those Members who concurred in the judgments on the narrowest grounds . . ." Marks v. United States, 430 U.S. 188, 193, 97 S.Ct. 990, 993, 51 L.Ed.2d 260 (1977) (citation omitted). We conclude that Justice Kennedy's view that the eighth amendment "forbids only extreme sentences that are 'grossly disproportionate' to the crime" is the "rule" of Harmelin. Accord United States v. Johnson, 944 F.2d 396, 408-09 (8th Cir.), cert. denied, 502 U.S. 1008, 112 S.Ct. 646, 116 L.Ed.2d 663 (1991); United States v. Hopper, 941 F.2d 419, 422 (6th Cir. 1991).

Bland, 961 F.2d at 128-29.[11]

In Bland, the defendant was sentenced to life without parole following his conviction for felon in possession of a firearm. The Ninth Circuit found that this sentence did not violate the Eighth Amendment:

> The threshold determination in the eighth amendment proportionality analysis is whether Bland's sentence was one of "the rare cases[s] in which a . . . comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." Harmelin, 111 S.Ct. at 2707 (Kennedy, J., concurring). In judging the appropriateness of Bland's sentence under a recidivist

---

11. But see discussion of proportionality requirement in United States v. Kalena, 152 F.2d 1069 (9th Cir. 1998), opinion withdrawn on grant of reh'g en banc, 161 F.3d 1225 (9th Cir. 1998).

> statute, we may take into account the government's interest not only in punishing the offense of conviction, but also its interest "in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law." Rummell v. Estelle, 445 U.S. 263, 276, 100 S.Ct. 1133, 1140, 63 L.Ed.2d 382 (1980). Bland's history of criminal conduct refutes any possibility of disproportionality. He has been convicted of thirteen violent felonies, including assault, rape, kidnaping, burglary, assault with intend to commit rape, forcible lewd act on a child, and forcible copulation.

Bland, 961 F.2d at 129.

In the instant case, petitioner was convicted of petty theft with a prior. However, he has a criminal history that includes six prior felony and sixteen prior misdemeanor convictions.[12/]

Looking only to the crime at issue, reasonable arguments could be made that a sentence of twenty-five years to life for theft of a car alarm is one of those rare circumstances in which the court should engage in a proportionality analysis. However, heeding both Bland's and the Supreme Court's admonition that in light of the fact that petitioner was sentenced under a recidivist statute "we may take into account the government's interest not only in punishing the offense of conviction, but also its interest 'in dealing in a harsher manner with those who by repeated criminal acts have shown that they

---

12. The probation report calculated that petitioner had 17 prior felony and 25 prior misdemeanor convictions. CT at 231. It appears that this includes petitioner's juvenile record. The California Court of Appeal stated that petitioner had five felony convictions and 17 misdemeanor convictions. Respondent's Exhibit A, p. 3.

are simply incapable of confirming to the norms of society as established by its criminal law,'" Bland, 961 F.2d at 129 (quoting from Rummel v. Estelle, 445 U.S. 263, 276, 100 S. Ct. 1133,1140 (1980)), surely, petitioner's record qualifies him for harsh treatment under California's recidivist "three strikes" sentencing scheme.

Moreover, the result in this case is supported by Hutto v. Davis, 454 U.S. 370, 102 S. Ct. 703 (1982) in which the defendant's sentence of forty years in prison (two consecutive sentences of twenty years), based upon a seizure of nine ounces of marijuana and evidence of sale to others, was upheld against an Eighth Amendment challenge. The lower courts substitution of their own judgment for an appropriate punishment for the small amount of marijuana involved in lieu of the judgment of the Virginia Legislature, and the disregard of the Supreme Court's Rummel precedent, brought a sharp rebuke from the Supreme Court. And, the Hutto v. Davis case did not even involve a recidivism analysis.[13]

The California Court of Appeal's denial of this claim was not an unreasonable application of clearly established federal law. Accordingly, this claim should be denied.

D. Ex Post Facto

Petitioner argues that his prior felony convictions cannot be counted as strikes because they occurred before March 1994 when the three strikes law was enacted. As strikes, the court used his 1984 robbery conviction and his 1976 assault with a deadly weapon conviction. Petitioner contends that use

---

13. Moreover, the case of Solem v. Helm, 463 U.S. 277, 103 S. Ct. 3001 (1983), in which the Supreme Court did strike down a sentence as being disproportionate and in violation of the Eighth Amendment, is quite distinguishable. In that case the defendant received a life without parole sentence for conviction related to small amount financial crimes. Petitioner herein will be eligible for parole in approximately twenty years, and his recidivist record which includes violent felonies is much worse than that of defendant Helm.

of these convictions as strikes violates the Ex Post Facto Clause.

A law violates the Ex Post Facto Clause only if it: 1) punishes as criminal an act which was innocent when committed; 2) makes a crime's punishment greater than when the crime was committed; or 3) deprives a person of a defense available at the time the crime was committed. Collins v. Youngblood, 497 U.S. 37, 42, 110 S. Ct. 2715 (1990). The second type of ex post facto problem is at issue here.

The application of an enhancement due to a prior conviction is not a violation of the Ex Post Facto Clause of the United States Constitution. McDonald v. Massachusetts, 180 U.S. 311, 312-13, 21 S. Ct. 389 (1901); United States v. Sorenson, 914 F.2d 173, 174 (9th Cir. 1990). The enhancement is not a penalty for the prior offense. McDonald, 180 U.S. at 312-13. It is the repetitive nature of the present offense that the enhancement punishes. Id. "The statute, imposing a punishment on none but future crimes, is not ex post facto." Id. at 313. Recidivist statutes do not violate the Ex Post Facto Clause if they are on the books at the time the present offense was committed. See United States v. Ahumada-Avalos, 875 F.2d 681, 683-84 (9th Cir. 1989).

The Three Strikes law was on the books when petitioner committed his present offense. The law does not alter petitioner's punishment for his two strike convictions, but imposes a harsher penalty for his current offense because he is a repeat offender. The use of the prior convictions to enhance the present conviction does not violate the Ex Post Facto Clause. Accordingly, this claim should be denied.

Accordingly, IT IS HEREBY RECOMMENDED that petitioner's application for a writ of habeas corpus be denied.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned

"Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: June 29, 1999.

/s/
GREGORY G. HOLLOWS
UNITED STATES MAGISTRATE JUDGE